No. 80-1662

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In the Supreme Court of the United States

OCTOBER TERM, 1980

BARTLETT-COLLINS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly concluded that petitioner violated Section 8(a)(5) of the National Labor Relations Act by insisting to impasse upon the employment of a court reporter to transcribe collective bargaining negotiations as a precondition to entering into such negotiations with the union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-12) is reported at 639 F.2d 652. The Board's decision and order (Pet. App. A-15 to A-28) is reported at 237 N.L.R.B. 770.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1981 (Pet. App. A-13 to A-14). The petition for a writ of certiorari was filed on April 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

In addition to the provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, set forth in the petition (at 2-3), Section 8(d), 29 U.S.C. 158(d), is also relevant. That Section provides in part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

STATEMENT

1. In 1974, the Board certified the American Flint Glass Workers of North America, AFL-CIO, as the collective bargaining representative of petitioner's employees. After seven bargaining sessions, the Union filed charges with the Board and a complaint issued, alleging, *inter alia*, that petitioner had violated Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), by bargaining in bad faith (Pet. App. A-17). On June 30, 1976, an Administrative Law Judge ("ALJ") issued a decision finding, *inter alia*, that petitioner in fact had conducted negotiations in a manner that fell short of the Act's requirement of good faith bargaining. In making his findings of fact, the ALJ primarily relied on the testimony of a Union negotiator that was not materially controverted by petitioner's witnesses (Pet. App. A-17 to A-18).

The parties resumed negotiations on July 29, 1976. Petitioner's chief negotiator, Harold Mueller, had arranged for a certified court reporter to make a verbatim transcript of the bargaining session (Pet. App. A-19). Mueller asserted that, in view of the prior Board proceeding " 'in which there was some question about the accuracy of testimony concerning what had transpired at bargaining meetings' " (Pet. App. A-3), there was a need to maintain an official transcript of all bargaining sessions. The Union's negotiator, John Keefer, objected to the presence of a court reporter on the grounds, *inter alia*, that such a procedure would create a courtroom atmosphere, encourage speech making for the record, and thereby frustrate meaningful negotiations. After extended debate, the Union agreed to the presence of the reporter for that day's meeting only, but refused to agree to such a procedure for future meetings (Pet. App. A-3, A-18).

After the July 29, 1976 meeting, petitioner filed exceptions to the ALJ's decision of June 30, 1976, and no further sessions were held. On June 13, 1977, the Board issued its decision affirming the ALJ's decision in relevant part. See *Bartlett-Collins Co.*, 230 N.L.R.B. 144 (1977). Thereafter, the parties arranged bargaining sessions for July 20, 21 and 22, 1977 (Pet. App. A-18 to A-19). Then, by letter of June 30, 1977, petitioner reasserted its demand that the sessions be transcribed by a certified court reporter. By letter of July 8, 1977, the Union renewed its objections but proposed, by way of compromise, that each party make its own electronic recording of the bargaining sessions (Pet. App. A-3 to A-4, A-19 to A-20). Petitioner rejected the Union's alternative proposal and adhered to its position that it would not

meet without a certified court reporter (Pet. App. A-4, A-20). The Union thereupon filed the instant unfair labor practice charges with the Board (Pet. App. A-20).

2. Overruling prior Board decisions holding that, in the absence of bad faith, a party lawfully could demand that negotiations be transcribed by a court reporter, the Board found that such a demand does not constitute a mandatory subject of bargaining and that, therefore, petitioner's insistence upon the presence of a court reporter violated Section 8(a)(5) of the Act irrespective of petitioner's good or bad faith (Pet. App. A-21 to A-24). The Board noted that it had formulated its former position prior to the decision in *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), in which the Court distinguished between mandatory and nonmandatory subjects of bargaining and agreed with the Board that an employer's insistence to impasse upon a nonmandatory bargaining subject—namely, one that "settles no term or condition of employment" (*id.* at 350)—violates Section 8(a)(5) of the Act even though such insistence may be in good faith. Reexamining the stenographic transcription issue in light of *Borg-Warner*, the Board reasoned as follows (Pet. App. A-23; footnote omitted):

> The question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase "wages, hours, and other terms and conditions of employment." As it is our statutory responsibility to foster and encourage meaningful collective bargaining, we believe that we would be avoiding that responsibility were we to

> permit a party to stifle negotiations in their inception over such a threshold issue.

In support of its decision, the Board relied (Pet. App. A-23 n.9) on the opinion of experts in the field of labor relations that "the presence of a reporter during contract negotiations has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining."

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A-1 to A-12). The court noted (Pet. App. A-5) the mandatory/nonmandatory distinction drawn by this Court in *Borg-Warner*, *supra*, and concluded that the Board had acted reasonably in determining that "[t]here is 'no significant relationship between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees' " (Pet. App. A-7, quoting *Latrobe Steel Co.* v. *NLRB*, 630 F.2d 171, 176 (3d Cir. 1980), petition for cert. pending, No. 80-1824 (filed May 1, 1981)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review accordingly is unwarranted.

This Court has long recognized that, read together, Sections 8(a)(5) and 8(d) of the Act, 29 U.S.C. 158(a)(5) and 158(d), "establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment. . . .' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. * * * As to other matters, however, each party is free to bargain or not to bar-

gain * * * ." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 210 (1964), quoting *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Lawful bargaining subjects thus fall into two mutually exclusive categories—mandatory and nonmandatory subjects of bargaining—and, even in the absence of bad faith, a party violates Section 8(a)(5) of the Act by insisting to the point of impasse that the other party accede to a nonmandatory demand. *Borg-Warner*, *supra*, 356 U.S. at 348-350.

In determining what subjects are mandatory subjects of bargaining, this Court has recognized both the clear congressional intent to limit the scope of mandatory bargaining to "issues that settle an aspect of the relationship between the employer and employees" (*Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)), and that the " 'classification of bargaining subjects as "terms [and] conditions of employment" is a matter concerning which the Board has special expertise' " (*id.* at 182, quoting *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 685-686 (1965)). Accordingly, the Board's "judgment as to what is a mandatory bargaining subject is entitled to considerable deference" and should be "accepted and enforced" unless "unreasonable or unprincipled." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495, 497 (1979).

The Board's holding that the issue of whether bargaining sessions are transcribed does not fall within the phrase " 'wages, hours, and other terms and conditions of employment,' " but rather is a "threshold matter, preliminary and subordinate to substantive negotiations" (Pet. App. A-23), is a reasonable and principled construction of the Act. Because bargaining over the court reporter issue "settles no term or con-

dition of employment" (*Borg-Warner, supra,* 356 U.S. at 350), the Board properly could conclude that, by conditioning any bargaining about substantive matters upon the Union's agreement on this nonmandatory issue, petitioner failed to meet its bargaining obligations under Sections 8(d) and 8(a)(5) of the Act. See *Borg-Warner, supra,* 356 U.S. at 349.

Moreover, the Board's decision to treat the issue of transcribing bargaining sessions like other nonmandatory or permissive subjects of bargaining is in harmony with actual industrial practice and with the opinion of experts in the field of labor relations that the practice of recording bargaining sessions interferes with the collective bargaining process and should be used only with the voluntary consent of both parties.[1] This Court has recognized that, "[w]hile not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining." *Fibreboard, supra,* 379 U.S. at 211 (footnote omitted).

Finally, the decision below is consistent with the decision of the only other court of appeals that has addressed this issue. In *Latrobe Steel Co.* v.

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[1] See the authorities cited by the Board at footnote 9 of its decision and order (Pet. App. A-23). See also N. Chamberlain, *Collective Bargaining Procedures* 62 (1944); C. Kerr & R. Randall, *Crown Zellerbach and the Pacific Coast Pulp and Paper Industry: A Case Study* 48-49 (1948); B. Morse, *How to Negotiate the Labor Agreement* 44 (5th ed. 1974); National Industrial Conference Board, Inc., *Conference Board Reports: Preparing for Collective Bargaining* 40 (1959); S. Slichter, J. Healy & E. Livernash, *The Impact of Collective Bargaining on Management* 938 (1960); R. Smyth & M. Murphy, *Bargaining with Organized Labor* 47 (1948).

NLRB, 630 F.2d 171, 176 (1980), petition for cert. pending, No. 80-1824 (filed May 1, 1981), the Third Circuit held that, because there was "no significant relationship between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees," the Board's treatment of that issue as a nonmandatory subject of bargaining was a "reasonable interpretation of the Act."

Contrary to petitioner's contention (Pet. 5-6), there is no conflict between these decisions and the Eighth Circuit's holding in *NLRB* v. *Southern Transport, Inc.*, 355 F.2d 978 (1966). Both the court below (Pet. App. A-11) and the Third Circuit in *Latrobe Steel, supra*, 630 F.2d at 177, correctly distinguished *Southern Transport* on the ground that the court in that case focused on the question whether a demand for a court reporter was made in good faith, and did not consider whether the matter was a mandatory subject of bargaining. Indeed, in *Southern Transport*, the court described the case before it in the following terms (355 F.2d at 982, 981):

> Neither the Board nor the Courts have squarely ruled on the issue of whether a party could lawfully require, as a precondition to negotiations, that a reporter be present to make a transcript of the proceedings which transcript would be binding on the parties. The Court recognizes the basis of this unfair labor practice charge is concerned with the motive with which Respondent is attempting to conduct its negotiations.
>
> * * * * *
>
> The Board decided that Respondent's demand was made in bad faith, but it is our belief that

there is no substantial evidence in the record upon which this finding could be based * * *.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] As the court below properly noted (Pet. App. A-11), the Eighth Circuit's favorable comments concerning the stenographic recording of bargaining sessions were made "in relation to the court's decision that the insisting party's demand had been made in good faith. The Eighth Circuit did not consider whether the matter constituted a mandatory subject of bargaining."

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